Supreme Court, U.S.
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No. 86-56

In The
Supreme Court of the United States
October Term, 1986

JERRY D. SHOECRAFT,
Appellant,

v.

CATHOLIC SOCIAL SERVICES BUREAU, INCORPORATED, A NON-PROFIT NEBRASKA CORPORATION: JOHN AND MARY DOE; DEPARTMENT OF SOCIAL SERVICES, STATE OF NEBRASKA,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

MOTION OF APPELLEES TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS & STATUTES	1
STATEMENT OF THE CASE	5
MOTION TO DISMISS	6
MOTION TO AFFIRM	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

	Pages
Caban v. Mohammed, 441 U.S. 380 (1979)	7, 8
DeFunis v. Odegaard, 416 U.S. 312 (1974)	6
Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976)	6
Herb v. Pitcairn, 324 U.S. 117 (1954)	7
New York Times v. Jascalevich, 439 U.S. 1317 (1978)	10
Quilloin v. Walcott, 434 U.S. 246 (1978)	7
Weinstein v. Bradford, 423 U.S. 149 (1975)	6

CONSTITUTION:

U.S. Const., art. III, § 2	1, 6
U.S. Const. amend XIV, § I	2

OTHER AUTHORITIES:

Nebraska Statutes, Section 43-104.01	2, 10
Nebraska Statutes, Section 43-104.02	2, 6
Nebraska Statutes, Section 43-104.03	3
Nebraska Statutes, Section 43-104.04	3
Nebraska Statutes, Section 43-104.05	3
Nebraska Statutes, Section 43-104.06	4, 5, 6, 10

Pursuant to the provisions of Rule 16 of this Court all appellees move this court for an order dismissing appellant's appeal or; in the alternative, for an order affirming the decision of the Supreme Court of the State of Nebraska rendered April 25, 1986.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska is found at 222 Neb. 574, — N.W.2d — (1986), and accurately is reproduced at Appendix A, p. App. 1 of appellant's jurisdictional statement. The decision of the District Court of Lancaster County, Nebraska, reversed by the Supreme Court of the State of Nebraska, is unreported. It is, however, accurately reproduced at Appendix C, p. App. 18 of appellant's jurisdictional statement.

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CONSTITUTIONAL PROVISIONS & STATUTES

U.S. Const., art. III, § 2:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and

Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make. . . .

U.S. Const. amend XIV, § I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nebraska Statutes, Sections 43-104.01 to 43-104.06, R.S. (Reissue, 1984):

43-104.01. *Adoption; act; applicability.* Section 43-104 shall apply to any adoption action pending in any court on March 1, 1971, which has not proceeded to final judgment.

43-104.02. *Adoption; child born out of wedlock; relinquishment or consent requirements; paternity claim; notice; contents.* (1) Relinquishment or consent for the purpose of adoption given only by a mother of a child born out of wedlock pursuant to section 43-104 shall be sufficient to place the child for adoption and the rights of any alleged father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has

filed with the Department of Social Services on forms provided by the department within five days after the birth of such child, a notice of intent to claim paternity.

(2) The notice shall contain the claimant's name and address, the name and last-known address of the mother, and the month and year of the birth or expected birth of the child.

43-104.03. *Paternity claim; notice; to whom given; effect.* Within three days after the filing of a notice to claim paternity, the Director of Social Services shall cause a certified copy of such notice to be mailed by certified mail to (1) the mother or prospective mother of such child at the last-known address shown on the notice of intent to claim paternity, or (2) an agent specifically designated in writing by the mother or prospective mother, to receive such notice. The notice shall be admissible in any action for paternity under sections 43-1401 to 43-1413, and shall estop the claimant from denying his paternity of such child thereafter and shall contain language that he acknowledges liability for contribution to the support and education of the child after its birth and for contribution to the pregnancy-related medical expenses of the mother.

43-104.04 *Paternity claim; failure to file notice; effect.* If a notice of paternity is not filed within five days, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Social Services shall supply, a certificate that no notice of intent to claim paternity has been filed with the department and the filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the natural father of such child.

43-104.05. *Paternity claim; notice; filed; petition for adjudication of paternity; hearing.* If a

notice of intent to claim paternity is filed within five days ofter the birth of such child, either the claimant-father, the mother, or her agent specifically designated in writing may file a petition in the county court in the county where such child is a resident for an adjudication of the claim of paternity. After the filing of such petition, the court shall set a hearing date upon proper notice to the parties not less than ten nor more than twenty days after such filing. If the mother contests the claim of paternity, the court shall take such testimony as shall enable it to determine the facts.

43-104.06. *Paternity claim; contest by claimant; court; findings; relinquishment of child to placement agency; when.* (1) If the claimant seeks to oppose any proposed relinquishment of a child by the mother and requests custody of the child, the court shall inquire into the fitness of the claimant, his ability to properly care for the child, and whether the best interests of the child will be served by granting custody to the claimant. Only upon the appointment of a guardian ad litem for the child, and a finding that the claimant is a fit person, is able to properly care for the child, and that the child's best interests will be served by granting custody to the claimant, shall custody be granted to the claimant.

(2) Upon relinquishment by the mother to a child placement agency licensed by the State of Nebraska, or upon a finding that the child's best interests would not be served by granting custody to the claimant, together with the recommendation by the guardian ad litem, and a finding that termination of the rights of the mother and the father is in the best interests of the child, the court shall terminate the rights of the mother and father and confer such rights upon the licensed child placement agency to whom the relinquishment has been given.

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STATEMENT OF THE CASE

The procedural history of the instant controversy as set forth in appellant's statement of the case generally is accurate. As to the "facts" as set forth by appellant there should be added that except for his expressed desire to assume parental responsibility for his child, appellant did nothing to foster that relationship. He did not visit the child's mother during her pregnancy after she moved from Lincoln to Grand Island in July of 1984. He contributed not a cent to the mother's or the child's hospital and other medical expenses; he paid no other expenses; and he even refused to return a medical questionnaire sent to him on behalf of the Catholic Social Services Bureau. The questionnaire was sent to him before the birth of the child and requested, for adoption placement purposes, information as to the appellant's and his family's medical history.

Also missing from appellant's statement of the case is the disclosure that subsequent to the ruling of the state District Court, and during the time that the Supreme Court of the State of Nebraska had the issues under submission, an evidentiary hearing was held in the County Court of Lancaster County Nebraska pursuant to Nebraska Statutes, Section 43-104.06(1), R.S. (Reissue, 1984), as to appellant's fitness to have custody of the child. The Section 43-104.06(1) proceedings were dismissed, upon motion, at the conclusion of appellant's case-in-chief.

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MOTION TO DISMISS

Appellees move for an order dismissing appellant's appeal on the basis that the issues between him and appellees are moot. Even if appellant's cause is successful in this Court to the extent that it is decided that the five-day filing requirement is unconstitutional, no benefit can obtain to appellant.

Appellant has had in the County Court of Lancaster County, Nebraska, the full benefit of the state District Court's ruling that Nebraska Statutes, Section 43-104.02(1), R.S. (Reissue, 1984) is unconstitutional. Before the Nebraska Supreme Court overturned the District Court's ruling appellant's fitness to have custody of his child fully was litigated pursuant to Nebraska Statutes, Section 43-104.06(1), R.S. (Reissue, 1984). He lost, he did not appeal that decision, and that decision now is final. Hence, there is no case on controversy between appellant and appellees wherein appellant has a personal stake in the outcome of the case. Dismissal is required. U.S. Const. art. III, § 2. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

This is not a case governed by the rule in *Weinstein v. Bradford*, 423 U.S. 149 (1975), where a moot issue was classed as one where there " . . . was a reasonable expectation that the same party would be subjected to the same action again." 423 U.S. at 149. Nothing this Court may do, as a result of appellant's appeal, will effect Mr. Shoecraft's right to his child or the adoption thereof by Mr. and Mrs. Doe.

MOTION TO AFFIRM

In the alternative to their motion to dismiss, appellees move for an order affirming the judgment of the Supreme Court of the State of Nebraska. The Nebraska Court fully, fairly and accurately considered appellant's constitutional claims and determined that a ruling as to the statute's constitutionality in the abstract was not required because under the particular surrounding facts, the five-day notice requirement as applied to appellant was not unconstitutional. 222 Neb. 574, 580. The Nebraska Court fully recognized the constitutional principles involved and based its decision on settled federal constitutional principles as interpreted by this Court in *Caban v. Mohammed*, 441 U.S. 380 (1979), and *Quilloin v. Walcott*, 434 U.S. 246 (1978).

In addition to the fact that the Nebraska Court correctly decided the controversy from the standpoint of federal constitutional doctrine, its decision is based on independent non-federal grounds, that is, determinations that appellant's conduct, vis-a-vis has child and the mother, and the facts of the pregnancy and birth as he knew them to be, took him out of the category of litigants who could benefit by a finding that the five-day notice requirement was unconstitutional. *See, Herb v. Pitcairn*, 324 U.S. 117 (1954).

> The statutory scheme here requires the father of a child born out of wedlock to declare himself as such within 5 days after the birth of the child and to assume the financial obligations of that status. The Nebraska statutory scheme does not provide for notification to the father of the birth of the child.

> That omission might well, in a particular case, render constitutionally suspect as violative of due process the termination of the father's rights. See *Caban v. Mohammed, supra.* However, the facts in this case clearly demonstrate that the appellee father knew of the pregnancy as soon as the condition could be medically verified. He knew the whereabouts of the mother and was advised of the birth on the date of occurrence. Except for conversations relating to the disposition of the child, no manifestation of his intention to assert rights was made known. The record is completely devoid of any financial contribution to the expenses of maintainance during pregnancy or of other medical expenses. The lack of a provision for notice in the statutes does not render the scheme unconstitutional as to the appellee father.

222 Neb. 574, 578.

The Nebraska Court then went on to balance the competing interests among appellant, Miss Davis, the prospective adoptive parents, the adoption agency and the state in general.

> The Legislature, in the passage of §§ 43-104.02 et seq., was concerned about the problems facing an unwed mother as to the retention of custody of the child or the relinquishment of the child to an agency for placement in an appropriate home. The 5-day period after birth was selected, in the words of the introducer, "primarily because this is pretty much a standard length of time that a child and the mother might be kept in the hospital anyway." Judiciary Committee Hearing, L.B. 224, 84th Leg., 1st Sess. 2 (Jan. 29, 1975) (statement of Sen. Anderson). An unwed mother would then know at the time she is likely to be released from the hospital whether the father will step forward, claim his own flesh and blood, and assume the responsibilities he biologically

created. If not, the mother may then make the painful decision alone and not be left in the terrible limbo of growing attachment and love for the child, awaiting either the outcome of a judicial proceeding with its attendant notoriety or decision of the amorous Hamlet in the wings, pondering whether he should assume his responsibility.

It is further obvious that the Legislature exercised a judgment favoring adoption of children of unwed couples as soon as possible after birth, concluding that the placement of the child in a home with persons anxious to have, love, and rear the child is to be preferred over a battleground where the mother must either depend on social agency support or on the outcome of a judicial support proceeding to compel the father to assume his responsibility.

The Legislature also considered (in view of the extended testimony) the views of the licensed child placement agencies that rapid determination of the rights, if any, of an unwed father to object to a relinquishment and subsequent adoption is in the best interests of the child, the relinquishing mother, and of the prospective adoptive parents. That prospective adoptive parents would assume custody of a newborn with the prospect of later having to surrender the child is questionable. That the Legislature accomplished those goals with the passage of the act is clear. It is further clear that the problems of unwed births and adoptions are legitimate concerns of the Legislature.

In consideration of the countervailing claims of this appellee father, we must note that, until after the birth, he exhibited (at least financially) no responsibility for the child or the mother. This is not a case where he lived with the child and nurtured and supported it and the mother. Thus, his rights, as Justice Marshall observed in *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), "are readily distinguishable from those of a separated or divorced

> father, and [we] accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."
>
> We are not impressed with the excuse that the appellee father did not know of the 5-day limitation. In this matter he is presumed, as are all citizens, to know the law. Statutes of limitation bar evenly the claims of the wary and the unwary and the just.

222 Neb. 574, 579-580.

The Nebraska Legislature acted responsibly and constitutionally in its enactment of Sections 43-104.01 through 43-106. The Supreme Court of Nebraska properly interpreted the act's provisions. On both federal constitutional principles and upon the other non-federal grounds used by the Nebraska Court for its decision, an order of affirmance should issue. *New York Times v. Jascalevich*, 439 U.S. 1317 (1978).

CONCLUSION

For the reasons and upon the authority set forth above, Mr. Shoecraft's appeal must be dismissed. In the alternative the decision of the Supreme Court of the State of Nebraska must be affirmed.

Respectfully submitted,

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